IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 8597 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE RAVI R.TRIPATHI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

SWASTIK TECHNOMECH PVT. LTD.

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 8597 of 2001

MR AK CLERK for Petitioner No. 1

MR RV DESAI Ld. AGP for Respondent No.

RULE SERVED BY DS for Respondent No. 2

CORAM : MR.JUSTICE RAVI R.TRIPATHI

Date of decision: 08/03/2002

ORAL JUDGEMENT

1. The present petition is filed by the petitioner company challenging the order of reference dated

9.8.2001, a coy of which is produced at Annexure-K to this petition.

2. To appreciate the controversy involved in the petition, few facts are necessary.

2.1 The respondent workman with two other workmen stopped reporting for duty on 5.1.2001. The petitioner company wrote a letter on 8.1.2001 asking the respondent workman to resume the duty, copy of the said letter is produced at Annexure-A. The petitioner company wrote another letter on 11.1.2001 by Redg.Post A.D., a copy of which is produced at Annexure-B. Though both these letters were addressed to the same address only letter dated 11.1.2001 was served while the earlier has returned to the petitioner company.

2.2 The petitioner company received a notice from the Assistant Commissioner of Labour dated 8.1.2001, intimating that the hearing of the conciliation proceedings was fixed on 30.1.2001. The petitioner company, wrote yet another letter to the respondent workman dated 17.1.2001 asking him once again to report for duty. The said letter also returned unserved to the petitioner company. The petitioner company then wrote another Redg. Post A.D. letter dated 9.2.2001 asking respondent workman to report for duty. The said letter was served to the respondent workman.

2.3 The petitioner company received another letter dated 27.3.2001 from the Commissioner of Labour intimating that the final date of conciliation proceedings is 26.4.2001. In response to that, the petitioner company wrote a letter on 16.4.2001 to the Assistant Commissioner of Labour requesting to adjourn the hearing of the proceedings. The petitioner company then wrote a letter dated 15.5.2001 to Assistant Commissioner ofLabour informing him that the respondent workman has resumed duty on 27.4.2001 and, therefore, the question of reinstating him does not survive. The petitioner company also pointed out in that letter that respondent workman was giving low production as compared to his earlier performance and, therefore, he should be persuaded to give full production. Copy of the letter dated 15.5.2001 is produced at Annexure-F to this petition.

2.4 The petitioner company then served a show cause notice dated 19.5.2001 to the respondent workman for his gross negligence and irregularities in attendance which were resulting in financial loss to the company. The

respondent workman when reported for duty on 21.5.2001, on that day, he did not perform the work assigned to him by his Superior Officer and created a commotion and left the work. He did not report for duty thereafter. The petitioner company wrote a Redg. Post A.D. letter dated 23.5.2001 to the respondent workman asking him to report for duty and also to submit his explanation to the show cause notice dated 19.5.2001. The letter dated 23.5.2001 was served to the workman on 26.5.2001.

2.5 On 18.6.2001, the petitioner company wrote another letter by Regd.Post A.D. which was served to the respondent workman on 20.6.2001. In this letter it was stated that the respondent workman had telephoned the petitioner company on 16.6.2001. He requested the company to permit him to resign and informed the company that he does not want to work with the company. The respondent workman asked the company to send his dues at his residential address after accepting his oral resignation. The petitioner company informed the respondent workman that the company will send his dues by a money order. A copy of the letter dated 18.6.2001 is annexed to the petition as Annexure-I.

2.6 The petitioner company received an order dated 23.7.2001 from the State Government, whereby the dispute regarding back wages from 5.1.2001 to 26.4.2001 is referred to the Labour Court at Ahmedabad. It is required to be noted that this order of reference "dated 23.7.2001 whereby the dispute about the back wages from 5.1.2001 to 26.4.2001" is referred is not under challenge.

2.7 The grievance in this petition is about the second order of reference which is dated 9.8.2001. By this 2nd order the dispute about 'reinstatement with full back wages' is referred. It is this order of reference dated 9.8.2001, copy of which is produced at Annexure-K to this petition is under challenge in this petition.

3. Mr. Clerk the learned advocate appearing for the petitioner company argued the matter on 7.3.2002 i.e. yesterday. The order of reference dated 9.8.2001 is assailed mainly on the ground that before receiving this order of reference the petitioner company was not served with any complaint, filed by the respondent workman. It has also not received any intimation regarding the hearing of conciliation proceedings undertaken by the concerned Officer under the relevant provisions of the Industrial Disputes Act, if any. The petitioner company is not in receipt of any failure report of the

conciliation proceedings. In absence of all these things, an order of reference is not only unjust and arbitrary but whimsical.

4. Mr. Clerk submitted that it is clear from the record that the petitioner company did respond to the notice issued by the concerned Officer at the time of the first complaint filed by the respondent workman, on the basis of which earlier order of reference dated 23.7.2001 was passed, whereby the dispute regarding back wages from 5.1.2001 to 26.4.2001 was referred. He submitted that if the petitioner company had responded to the notice in the earlier case why would the company not respond to the notice in the second case. He submitted that in fact, the petitioner company did not receive either the complaint, intimation of conciliation proceedings or the failure report. What is received by the petitioner company is directly an order of reference, which according to him is wholly unwarranted and required to be quashed and set aside by this Court being vitiated on more than one grounds.

5. Mr. Clerk submitted that under the provisions of I.D.Act, an appropriate Government may by an order in writing refer a dispute to any of the Forum contemplated under Section 10 of the I.D.Act. But then as the scheme stands, 'an appropriate Government' is to form 'an opinion' on necessary material. This necessary material is to be in the form of a complaint, conciliation proceedings, and the result of it which may be positive or negative. In case the result is positive, there is no question of ordering any reference, but if the result is negative an order of reference is made. What is important is that the order of reference is to be made when an appropriate Government forms an opinion to the effect that industrial dispute exists or is apprehended and that requires to be referred to an appropriate Forum.

6. Mr. Clerk submitted that in the present case, it cannot be said that there was material to form an opinion by appropriate Government. In absence of these conditions precedent order of reference is of no consequence and, therefore, the order under challenge making reference dated 9.8.2001 is required to be quashed and set aside.

7. It is required to be noted that the matter was filed on 12.9.2001 and on 28.9.2001, this Court (Coram : Mr. K.M.Mehta,J.) passed the following order :

"1. Heard Mr. H.R.Raval learned advocate for

Mr. A.K.Clerk for the petitioner.

2. Mr. Raval learned advocate has pointed out that the respondent no.2 workman has expressed his desire to resign from the employment of the petitioner company and thereafter the petitioner company had given him all the legal dues on 18.6.2001. Thereafter there was no relationship of employer and employee between the petitioner company and the respondent no.2 workman. However, according to Mr. Raval, the petitioner company received an order of Reference dated 23.7.2001 from the Commission of Labour referred the dispute regarding back wages from 5.1.2001 to 26.4.2001. There is also another order of reference of the workman regarding reinstatement. Hence Rule.

3. Notice as to interim relief returnable on 12.10.2001.

4. In the meanwhile, ad-interim relief in terms of para.23(A)."

Para.23 reads as under :

Para.23

"During the pendency and final disposal of this petition this Hon'ble Court may be pleased to pass an order

(a) Staying the operation and implementation of the impugned order of Reference dated 9.8.2001 and staying further proceedings pursuant to the said order before the Labour Court No.3 at Ahmedabad."

8. It is required to be noticed that on 25.10.2001, this Court (Coram : Mr. P.B.Majmudar,J.) has passed the following order :

"Inspite of service of rule and notice as to interim relief nobody is appearing for the concerned workman. Hence, ad-interim relief granted by this Court is confirmed. The matter be listed on final hearing board on 20.12.2001."

9. On 23.1.2001, this Court passed the following order :

"At the request of Mr. R.V.Desai, learned AGP, adjourned to 30.1.2002. No further time will be granted."

10. Thereafter, the matter was adjourned on more than half a dozen times. On 7.3.2002, when the matter was heard, it was submitted by the learned AGP appearing on behalf of respondent no.1 that respondent workman is not represented before the Court, and hence the matter may be adjourned.

10.1 Though the process of rule was served to the respondent workman before 25.10.2001 as on that day it was recorded by the Court that "Inspite of services of rule and notice as to interim relief, nobody appeared for the concerned workman" and interim relief granted earlier was confirmed. There is no justification for which the learned AGP should request that since the respondent workman is not represented before this Court, the matter be adjourned.

11. Mr. R.V.Desai learned AGP while arguing the matter invited the attention of the Court to the affidavit in reply filed by one Ms. Jayshri, Assistant Commissioner of Labour, Ahmedabad dated 13.2.2002. Mr. Desai submitted that the contention raised by the petitioner that, 'before making reference, the Government has not formed any opinion in the matter and referred the dispute', is baseless and, therefore, petition deserves to be dismissed in limine in view of the settled position of law. Mr. Desai also submitted that under Section 12(5) read with Section 10 of the I.D.Act, the Government is required to ascertain only one question as to whether any dispute exists between the parties or not, and if answer is yes it can refer the same. He also submitted that only in cases where the reference is refused the Government is required to give reasons. He also submitted that the satisfaction on which, under Section 10(1) of the I.D.Act an order of reference can be made, is only a subjective satisfaction of the Government with regard to be existence of 'apprehension of dispute'. Mr. Desai submitted that in view of the judgement of the Hon'ble Apex Court, referred to, in para.5 of the affidavit and also in view of the judgement of this Hon'ble Court, referred in the said paragraph, it cannot be said that the Government has exceeded its power or there is lack of jurisdiction on the part of the Government in referring the dispute in the present case.

12. While replying to the aforesaid contentions, Mr. Clerk learned advocate for the petitioner submitted that

petitioner company was not served with either the complaint or the intimation about the conciliation proceedings. Mr. Desai submitted on instructions from the Officer present before the Court that the petitioner company did not remain present before the conciliation Officer on three occasions. Mr. Desai produced the xerox copy wherein what is legible is that the petitioner company is shown in the column of name of Institution. In the column of complainant's name, the name of respondent workman is mentioned (Manubhai Bhavanbhai Limbachiya) and in the column of name of Union "the name of Gujarat Kamdar Rahat Sangh, General Workers" is mentioned. There is a printed format wherein the blank is filled in, which reads as under :

"Along with this application / complaint of the aforesaid applicant dated 23.5.2001 for back wages and reinstatement is enclosed if deemed fit then for the personal discussion and intimation letter be sent".

From the contents, it is clear that the said paper is in the nature of an office note, placed before the Assistant Labour Commissioner. From that paper, it cannot be made out that an intimation was sent to the petitioner company. Mr. Desai contended that he has the instructions that the intimations regarding conciliation proceedings were sent to the petitioner company. Mr. Desai was asked to keep the record of the conciliation proceedings present before this Court with a responsible officer on the next date i.e. today.

13. Today, Mr. Damor, Assistant Labour Commissioner is present before the Court. Mr. Desai submitted on instructions that no papers are available with his office, as all the papers are sent to the concerned Labour Court and, therefore, the papers which were available with the office of the Assistant Labour Commissioner are brought to this Court which are made available for the perusal of this Court.

14. From the papers produced before the Court, it is not borne out that an intimation was sent to the petitioner company and that the petitioner company did not remain present on various dates. What is revealed from these papers is that on 12.6.2001, respondent workman was present and petitioner company was not present. On that day, the matter was adjourned to 28.6.2001. On 28.6.2001, it is recorded that, 'parties were not present'. The matter was adjourned to 12.7.2001. On 12.7.2001, the respondent workman was

present and petitioner company was not present. On that very day i.e. 12.7.2001, it is further recorded that, 'on the basis of the letter of complaint, the respondent workman was removed from services and, therefore, reference is made. It is this 'reference' making order is under challenge.

15. Without going into the intricacies of law as to whether in the facts of the case, and in view of the provisions of Section 2A of the I.D.Act wherein it is provided that in the case of dismissal of even an individual workman, 'an industrial dispute' is deemed to have in existence and, therefore, the authorities could have made the reference. Without going to the provisions of Section 10(1) wherein it is provided that the appropriate Government of its own, when an industrial dispute exists or is apprehended, can make a reference. The present case is decided on the short ground that learned AGP is not able to satisfy the Court that an intimation was sent to the petitioner company.

16. When the petitioner company is not given any intimation by sending a copy of the complaint received from the respondent workman and is not intimated about the conciliation proceedings, the order of reference could not have been made.

17. Mr. Desai, learned AGP has produced a copy of the notification dated 26.3.1973, whereby under Section 39 of the I.D.Act,1947 the Government of Gujarat directed that the powers exercisable by it under Subsection 1 of Section 10 of the said Act shall in relation to the matters specified in item 3 of the Second Schedule, and item 10 of the Third Schedule, to the said Act, be exercisable also by all the Assistant Commissioners of Labour within their respective jurisdiction. So far as the notification is concerned, since there is no challenge to the said notification, this Court has no occasion to adjudicate upon the validity of that. But the submissions made by Mr. Desai that by virtue of this Notification, the Assistant Commissioner of Labour is authorized to make the order of reference on 9.8.2001, is not having any substance and the same is rejected.

18. There cannot be any dispute that even in the case of 'order of reference', 'minimum required of procedure', is to be followed. While following this procedure it is to be assured that there is no violation of principles of natural justice. In the present case, after having received a letter of complaint dated 23.5.2001 by the Authorities, the same ought to have been sent to the

employer. The learned Asst. Government Pleader is not able to show that the said letter of complaint dated 23.5.2001 was sent to the petitioner company. If that is so, on the ground of 'violation of principles of natural justice', the order of reference deserves to be quashed and set aside. Mr. Desai submitted that making a reference is a matter of discretion of the Officer. If he comes to the conclusion that there is an existing industrial dispute, he can make the order of reference. There is no dispute about this proposition of law that if there an existing dispute, after following the necessary procedure under Section-12 of the I.D.Act, an Officer can make a reference, but while so doing, 'principles of natural justice' cannot be given a go by is also equally important.

19. Mr. A.K.Clerk learned advocate for the petitioner submitted that in the present case, assuming for the sake of argument that this point is not available to the petitioner company, then in the alternative his submission is that on 16th June,2001 the respondent workman had telephoned the petitioner company and had requested to allow him to resign as he was not willing to work with the company and requested the company to send his dues at his residential address after accepting his oral resignation. Mr. Clerk submitted that pursuant to this telephonic talk, the company wrote a Redg.Post A.D. letter dated 18.6.2001 which was received by the respondent workman on 20.6.2001 and the amount sent by money order was also received by the respondent workman. This aspect of the matter is not controverted by the respondent workman. He has chosen not to remain present before the Court and, thus, his submissions are indirectly corroborated. The respondent workman despite service of process of this Court as back as in the month of September,2001 has chosen not to remain present before the court. The submission of Mr.Clerk deserves to be accepted and the same accepted.

20. In the facts and circumstances of the case, the order of reference dated 9.8.2001 is hereby quashed and set aside. The said order is quashed without going into the question of powers of the Assistant Commissioner of Labour under the Notification dated 26.3.1976. It is further clarified that in case the respondent workman has any dispute and if raises before the Authorities, the Authorities are not restrained by this quashing of the order of reference from considering the dispute raised by the respondent workman in accordance with law. Mr. Clerk submitted that it may be clarified that the Authorities shall give an intimation to the petitioner

company of the receipt of the complaint and shall also give the intimation about the conciliation proceedings along with an opportunity of hearing. The request of Mr. Clerk being reasonable, the same is granted. In case the respondent workman in future raises any dispute which is the subject matter of the letter of complaint dated 23.5.2001, the Authority under Labour Law shall proceed with the same in accordance with law complying with the principles of natural justice by giving aforesaid intimations and the opportunity of hearing.

21. This petition is accordingly allowed. Rule is made absolute with no order as to costs.

(Ravi R. Tripathi,J.)

(vipul)